GES ANAK BARUNDANG & ORS

v.

MD NOOR CHE ABD RAHMAN & ANOR

HIGH COURT SABAH & SARAWAK, KUCHING
MUHAMMAD KAMIL AWANG J
[CIVIL APPEAL NO: 12-18-1999-III/II]
28 JUNE 2000

CIVIL PROCEDURE: *Appeal - Facts, finding of - Whether trial judge correct on finding of fact - Circumstances in which finding of trial judge will be interfered with*

TORT: *Negligence - Collision between vehicles - Finding of liability - Consideration of evidence and facts adduced - Whether location of glass debris indication of any relevant fact*

The plaintiff ('PW1'), driver of a van, and the defendant ('DW3'), driver of a car, were involved in a collision resulting in PW1 sustaining injuries and both vehicles sustaining damage. The Sessions Court judge held that the plaintiff/appellants had failed in their claim against the defendant (respondents) and that the defendant was not negligent. It is against this decision that the appellants now appeal.

Among the grounds of appeal are that: (a) there were two conflicting versions by the appellants and the respondents of the collision of the two vehicles, the impact and the damages to both vehicles; (b) that the trial judge should not have relied on the police report made by PW1 as at that point in time, PW1 being a hospital patient suffering from injuries could not have been "composed, calm and collected to give a coherent, complete, precise and detailed account on how the collision occurred"; (c) that in the light of the fact that the appellants' van was on the grass verge of its lane and the respondents' car was encroaching into the appellants' lane, the trial judge had erred when she held that the collision happened in the middle of the road. Moreover since the debris was on the appellants' lane, this was *prima facie* proof of negligence on the respondents' part; and (d) that in the light of the fact that the debris was shattered all over, the trial judge had erred when she found as a fact that the respondents had braked upon the collision.

Held:

[1] When confronted with conflicting versions, the court should rely on neutral evidence such as the damages found on both vehicles and the evidence offered in the sketch plan and photographs in deciding which version to accept.

[1a] The trial judge did rely on such evidence together with the evidence of individual witnesses such as the loss adjuster who examined the vehicles, and the evidence of the investigating officer who was immediately at the scene of the accident on the same day and drew the sketch plan and took the photographs.

[2] The trial judge is the best person to decide on the evidence before her – that is which of the stories to believe. She has the benefit of observing the witnesses and their demeanour. The findings of the trial judge therefore after hearing and observing the demeanour of PW1, PW2, DW1, DW2 DW3 and DW4, supported by the sketch plan and photographs cannot be interfered with unless there is clear evidence to show that the findings were incorrect.

[3] DW3 was driving the car on the correct lane when he saw the van encroaching into his lane in a zig-zag manner. He then slowed down and moved to the left side of his lane, but the van kept moving in that zig-zag manner. At four to six meters from the van, DW3 reduced speed and swerved the car to the right towards the centre of the road and applied the brakes to avoid a collision with the van but the van swerved back to its own lane which resulted in the accident. In the circumstances, the driver of the car was not guilty of negligence or contributory negligence.

[4] There was no evidence to show that both vehicles stopped dead on impact. In any event, the location of the glass debris does not really shed any light as to where the impact had happened.

[Appeal dismissed.]

Case(s) referred to:

Chia Yan Tek & Anor v. Ng Swee Kiat & Anor [1997] 4 CLJ 535 ***(foll)***

China Airlines Limited v. Maltran Air Corp Sdn Bhd & Another Appeal [1996] 3 CLJ 163 ***(foll)***

Foong Nan v. Sagadevan [1971] 2 MLJ 24 ***(refd)***

Govinda Raju & Anor v. Laws [1966] 1 MLJ 188 ***(refd)***

KR Taxi Service Ltd & Anor v. Zaharah & Ors [1969] 1 MLJ 49 ***(foll)***

Lee Tai Kau v. Rajanderan Manikam [1995] 4 CLJ 521 ***(refd)***

Len Omnibus Co Ltd v. North South Transport Sdn Bhd & Another Appeal [1978] 2 MLJ 246 ***(refd)***

Mat Desa Salleh v. Ang Hock Lee & Anor [1979] 1 MLJ 241 ***(foll)***

Mohamed Salleh Awang & Anor v. Low Han Leong & Anor [1982] 1 MLJ 82 ***(foll)***
STARM Ramanathan Chetty v. Wong Ah Sam [1924] 4 FMSLR 229 ***(refd)***
Tang Tung Thian & Anor v. Supreme Leasing Kuching Sdn Bhd (Appeal No. 12-14-1999-III/II) (unreported) ***(foll)***

For the appellants - RJ Noel; M/s RJ Noel Advocates
For the respondents - Leonard Shim; M/s Reddi & Co Advocates

Reported by Mariette Peters-Goh

JUDGMENT

Muhammad Kamil Awang J:

There was a road accident involving a motor van registration no. KM 1039Q driven by PW1 and a car registration no. KG 6346Q driven by DW3. Both vehicles sustained damages, and some of the passengers in the van including PW1 suffered injuries as a result of the collision. The trial before the Sessions Court was to determine the issue of liability of the respective parties, and the quantum of damages, if any, would be decided later. The Sessions Court judge held that the appellants had failed in his claim against the respondent and that the respondent was not negligent. It is against this decision that the appellants now appealed.

The appellants submitted seven grounds of appeal, and grouped them into four groups; grounds 1 and 2, ground 3, grounds 4, 5 and 7, and ground 6.

Grounds 1 And 2

There are two conflicting versions, by the appellants and the respondent, in respect of the collision of the two vehicles, the impact and the damages to both vehicles.

PW1 testified that the "front left part (of the van) came into contact with the red car" and "exh. P5(c) shows the left side of the van was the most damaged". Exhibit P5(c), exh. P5(g), exh. P5(i) clearly showed that the damage to the van was mostly on the front side, and it followed that the front right part of the plaintiff's van came into contact with the defendant's red car.

DW1 testified that "the van suffered the impact more on the front right side". This stood unchallenged. The learned Sessions Court judge agreed with the observation made by DW1 in respect of the impact on both vehicles, and at p. 138 Appeal Record she held that:

> Both parties give conflicting versions. When confronted with this kind of situation, the court will rely on neutral evidence such as the damages found on both vehicles and the mute evidence offered in the sketch plan and plan and photographs in deciding which version to accept.

The trial judge had adopted the correct approach in deciding which of the two versions is more probable than the other. There is a plethora of authorities on this point. In *K.R. Taxi Service Ltd & Anor v. Zaharah & Ors* [1969] 1 MLJ 49, Raja Azlan Shah J (as His Royal Highness then was) held:

> ... in short, his version is that the taxi came at an excessive speed on the crown of the road and collided with his car which was stationary.
>
> In my view, the facts do not support his story. The broken glass found on the car's wrong side of the road tells a different story. The damage to both the vehicles also puts his story on a different plane. I am satisfied and so hold that the accident happened when the motorcar was crossing from its correct side of the road towards the opposite side. The sketch-plan bears that out.

In *Mat Desa bin Salleh v. Ang Hock Lee & Anor* [1979] 1 MLJ 241, Syed Agil Barakbah J (as he then was) held:

> On the other hand, the plaintiff's version is substantiated by the damage to both vehicles and the sketch plan and the nature of the injuries suffered, well indicating that the impact took place when both vehicles were at an angle, *viz* the plaintiff's motorcycle proceeding more towards the left in order to avoid the motor-car and the off-side front portion of the car coming into contact with the off-side of the motor-cycle with an angular rather than a full impact.

The Federal Court in *Mohamed Salleh bin Awang & Anor v. Low Han Leong & Anor* [1982] 1 MLJ 82, held:

> Faced with two conflicting and what he clearly considered both inadequate and inexact evidence, the learned judge turned to the sketch plan for a clearer picture of the event. It cannot be denied that the inferences which he drew from what is recorded thereon inclined him to the view that second plaintiff had encroached onto the path of the lorry at the time of the collision, and he therefore found that second plaintiff was liable to the extent of two-thirds, in short that his own negligence had been the major cause of his downfall.
>
> With regard to the first ground of appeal, we have compared the testimony of the two plaintiffs with the careful analysis of their evidence in the judgment of the trial court, and can find no fault with his Lordship's conclusion that neither plaintiffs had given a clear account of how the accident had happened. That the collision had taken place suddenly in conditions of poor visibility

a is common ground, and the cautious approach of the trial court in not relying on the mere oral testimony of either party but considering the probabilities in conjunction with other available evidence particularly that of the sketch plan, is beyond reproach.

In the present case, the trial court relied on the neutral evidence such as b the damages found on both vehicles, the sketch plan, the police reports lodged by both parties and photographs in deciding which version to accept. The evidence of independent witnesses was considered and accepted such as DW1 (Vincent Tan) the loss adjuster who examined the vehicles and DW2 (Sgt. John Sunju) the investigating officer who was immediately at c the scene of the accident on the same day and drew the sketch plan and took photographs.

In the judgment at p. 139 Appeal Record it is stated that:

The brake mark ("M") which measured 3.00 meters with its tail end measuring d 0.20 from ("N") from the middle white line indicates two possibilities:

1. The car braked violently and stopped in time after making a tyre mark measuring 8 meters.

2. The car braked violently and stopped upon impact.

e I consider the second possibility to be more probable for, if the car had stopped in time at 0.20 meters from the middle white line and if the van's tyre had already touched the white line as alleged, the collision would not have happened. For this reason I believe that the point of impact could not be at "X" as alleged by Plaintiff. For the same reasons I also do not think that the van's tyre had already touched the white line on its left side of the f road. Judging from where the brake mark ended the point of impact would have to be somewhere at the middle of the road. Accordingly the Plaintiff's allegation that before the collision the car had almost completely encroached into his lane is unsubstantiated by the sketch plan. On the contrary it is more consistent with the defendants' story that the collision happened in g the middle of the road.

From the careful analysis of the testimony of the plaintiffs compared with the evidence in the trial court, I find no fault in the judge's conclusion that neither parties have given a clear account of how the accident had happened. The trial court was cautious in not relying on the mere oral h evidence of either party but considering the probabilities in conjunction with the available evidence particularly that of the sketch plan, photographs and police reports. The conclusion made by the trial court was correct, and I am restrained from interfering with the said conclusion.

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Learned counsel, Mr. Noel, submitted that there was error in recording the evidence, which misled the court to draw a wrong inference from the evidence. This was hardly a point to be raised by Mr. Noel who well knew that it was neither raised in the memorandum of appeal nor an affidavit in support thereof had been filed.

Another startling point raised by Mr. Noel for the appellants was that the finding of the trial court that "There is every likelihood for the van to have encroached into the defendant's lane" was based on the allegations that PW1 had consumed some alcohol beverage the previous evening before the accident and that 17 years ago PW1 was admitted for observation in the Sarawak Mental Hospital, Kuching.

With respect, from the evidence, there was no such finding of fact made by the trial judge on these points. The allegations were baseless.

In the police report PW1 had not mentioned that the defendant's car encroached into the plaintiff's lane. On this point, the learned counsel submitted that at the material time, PW1 was a hospital patient suffering from injuries that he could not "be composed, calm and collected to give a coherent, complete, precise and detailed account of how the collision occurred". From the evidence that the said report was recorded two days after the accident, appeared to lend no support to the appellants' submission on this point.

Ground 3

The appellants contended that PW1 had encroached into the respondents' lane, which was rejected by the court.

At p. 140 Appeal Record, the trial judge in her judgment said:

> Photograph Ex P5(b) will show that there is a bend not far from the scene of the accident and it is a right hand bend. PW1 said that he was travelling at the speed of 50-60k/ph and after he had negotiated the bend, he was travelling down on a gentle slope. Considering that it is a right hand bend and the speed of the car at the time, bearing in mind that there was no other traffic on the road, it is very likely for the van to be hugging very much to the centre of the road or even encroaching over the other lane in order to negotiate a comfortable bend. In this case both DW3 & DW4 said the van encroached the road and travelled zig-zag at high speed. It is common knowledge that the van is a light-weight-vehicle though the size is large and with its height and narrow body is a difficult vehicle to maneuver when negotiating bend or corner. The speed of 50-60 km/ph is considered high when negotiating a bend and with common knowledge concerning the van which I have described earlier, it is not unlikely for the van to steer out of control after negotiating the bend and started travelling zigzag as described by DW3 and DW4.

There are finding of facts made by the trial judge based on the credibility of the testimonies of PW1, PW2, DW1, DW2, DW3 and DW4. The trial judge after hearing and observing the demeanour of these witnesses, supported by the sketch plan and photographs cannot be interfered unless there is clear evidence to show that the finding is wrong. I will reiterate what I have said in *Tang Tung Thian & Anor v. Supreme Leasing Kuching Sdn Bhd*, Kuching High Court Appeal No. 12-14-1999-III/II (unreported);

> The trial judge is the best person the decide on the evidence before her, which of the stories, the appellant's or the respondent's, to believe. She had the benefit of observing and seeing the witnesses and their demeanour and had rightly come to the conclusion on the facts that on the balance of probabilities, the appellant had failed to prove his claim.

The Court of Appeal in *Chia Yan Tek & Anor v. Ng Swee Kiat & Anor* [1997] 4 CLJ 535, said that:

> Based on the evidence presented before him, the trial judge was entitled to make his own assessment as to where the truth lay. In the words of Lord Diplock in *Tan Chow Sow v. Ratna Ammal* [1969] 2 MLJ 49, at page 50:
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> > ... this was a classic example of a case in which the decision depends entirely upon which parts of the conflicting testimony of the witnesses who gave oral evidence before the learned judge, at the trial, were to be believed. An appellate court, particularly where there is no full transcript of the oral evidence, is in a far less advantageous position to decide an issue of credibility than the trial judge who heard the evidence in full and observed the witnesses as they gave it, noting their pauses and their hesitations and any visible signs of confidence or embarrassment.
> >
> > The approach that an appellate court should adopt in a case of this nature had been stated repeatedly. But we must express our own inability to find a clearer statement of the appellate function than that formulated by Lord Shaw of Dunfermline in his speech in *Clarke v. Edinburgh Tramways Co.* [1919] SC (HL) 35, at p. 36. This is how he put it:
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> > When a judge hears and sees witnesses and makes a conclusion or inference with regard to what on balance is the weight of their evidence, that judgment is entitled to great respect, and that quite irrespective of whether the trial judge makes any observations with regard to credibility or not. I can of course quite understand the Court of Appeal that says that it will not interfere in the case in which the judge has announced as part of his judgment that he believes one set of witnesses, having seen them or heard them, and does not believe

> another. But that is not the ordinary case of a cause in a court of justice. In the courts of justice, in the ordinary case, things are more evenly divided: witnesses without any conscious bias towards a conclusion may have in their demeanour, in their manner, in their hesitation, in the nuance of their expressions, in even the turns of the eyelid, left an impression upon the man who saw and heard them, which can never be reproduced in the printed page. What in the circumstances, thus psychologically put, is the duty of the appellate court? In my opinion, the duty of an appellate court in those circumstances is for each judge of it to put himself, as I now do in this case, the question: am I – who sit here without the advantages sometimes broad and sometimes subtle, which are the privilege of the judge who heard and tried the case – in a position, not having those privileges, to come to a clear conclusion that the judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment.

Grounds 4, 5 & 7

The appellants submitted that the collision could not have happened in the middle of the road because the appellants' van was on the grass verge of its lane and the respondents' car resting encroaching into the appellants' lane. Further, the accident debris were on the appellants' lane. This was *prima facie* evidence of negligence. See *Lee Tai Kau v. Rajanderan Manikam* [1995] 4 CLJ 521.

Learned judge was correct in rejecting PW1 evidence regarding the position of the van prior to the accident based on the totality of the evidence. The sketch plan exh. 4A-B shows that the Sri Aman Lane at point A is 3.10 metres wide. PW1 testified that on seeing the car encroaching into his lane, he swerved to the left the tyres might have touched the white line on the left of the road. The plan shows that the front right tyre of the car at point 'N' only encroached 0.20 metres with Sri Aman lane at the point of impact.

However, evidence clearly shows that the impact is on the front right side of the van with the front left side of the red car. The photo exh. 5c shows that the front right side and the side door of the van sustained the most damage. Moreover PW1's version was not corroborated by the sketch plan, the photos or the brake marks or the extent of the damages of both vehicles.

DW3 was driving the car on the correct lane and he saw the van was encroaching into his lane in a zig-zag manner. At 60 metres he slowed down moved to the left side of his lane, but the van kept moving in the zig-zag manner. At four to six metres from the van, DW3 reduced speed and swerved the car to the right side towards the centre of the road and applied the brakes to avoid collision with the van but the van swerved back to its own lane which resulted in the accident. In the circumstances, I agree that the driver of the car was not guilty of negligence or contributory negligence. In *Len Omnibus Co. Ltd v. North South Transport Sdn Bhd & Anor & Anor Appeal* [1978] 2 MLJ 246, a lorry encroached into the path of a bus and kept coming towards the lorry on its incorrect side of the road resulting in the accident. The Federal Court held:

> There is evidence that the bus driver had reduced speed considerably before the impact. He had seen the fallen tree. But he did not expect the oncoming lorry to encroach into his path in order to pass it. The bus driver driving his vehicle along a straight stretch of road and on his correct side was justified in assuming that the on-coming lorry would keep to its side and would not encroach into the former's path. By so doing the lorry had put the bus into a situation of extreme peril and it is idle to say that if the bus driver had acted rashly in the agony of the moment he was guilty of contributory negligence. In those circumstances the bus driver was not expected to behave like a superman: (see *K.R. Taxi Service Ltd v. Zaharah*). We are only too familiar with cases of collision being brought about by rashness owing to want of due consideration as to the act to be done: (see *Govinda Raju v. Laws*). I would reiterate the remark I made in *Lim Kar Bee v. Abdul Latif Bin Ismail*: "The law is content to take the cavalier view that a driver of a motor car travelling along a main highway is under no duty to be on a look-out for anybody suddenly darting out into the road in a negligent and irresponsible manner."

In *Govinda Raju & Anor v. Laws* [1966] 1 MLJ 188, the plaintiff's motorcycle coming in the opposite direction saw the car swerving into his path and the motor cyclist swerved to the right to avoid the accident but knocked into the rear near side of the car. Raja Azlan Shah judge (as His Royal Highness then was) held:

> The plaintiff saw the motor vehicle swerving into his path. Perplexed by being exposed to the danger created by the defendant he also swerved to his right in an attempt to avoid the accident but failed. To my mind, when a plaintiff is perplexed or agitated when exposed to danger by the wrongful act of a defendant, it is sufficient if he shows as much judgment and control in attempting to avoid the accident as may reasonably be expected of him in the circumstances. To that extent I am satisfied that the plaintiff had so acted in the circumstances. What is done or omitted to be done in the agony of the moment cannot be fairly treated as negligence. I therefore hold that there is no contributory negligence on the part of the plaintiffs.

Ground 6

The appellants contended that when the respondents braked and collided with the car, it was expected that the debris from the collision would occur near or at the point of impact.

DW2 testified (at p. 119 Appeal Record) that:

> There were broken glasses on the road. It was scattered all over.

This piece of evidence remained unchallenged.

Learned trial judge held (at p. 143 Appeal Record):

> According to PW1 the broken glasses or debris were scattered all over but more to his side of the road. He disagreed that the debris were nearer to the car. However the Investigating Officer D.W.2 testified that the broken glasses were all over the place. As such I find the location of debris does not really shed any light as to where the impact had happened.

The court accepted this piece of evidence of DW2, and I have no reason to differ as DW2 was an independent witness and his evidence stood unchallenged.

In *Foong Nan v. Sagadevan* [1971] 2 MLJ 24, the Federal Court held that:

> It is said that most of the broken glass deposited by the defendant's car onto the road was on the defendant's side of the road and that this shows that probably the point of impact did occur on the defendant's side of the road or on the crown of the road as admitted by PW2. In my judgment, this independent testimony was inconclusive and so no reliance could be placed on it either way. The sketch and the photographs only showed the position of the two vehicles after the accident. We have no means of being sure of the point of impact as there were no brake or skid marks, but we can be sure that neither vehicle become rooted to the spot immediately on impact and that the car being heavier must after the impact have pushed the motor cycle some feet back. As regards the broken glass on the road, the first photograph shows that it was evenly distributed on both sides of the centre line.

In the present case, there is no evidence to show that both vehicles stopped dead on impact. In fact, DW4 testified that the red car moved two feet forward whereas the van swung back to the Sri Aman lane (see p. 127 Appeal Record). The broken glass fragments were scattered all over the road. I have no reason to disagree with the trial judge's finding that the location of the glass debris does not really shed any light as to where the impact had happened.

Mr. Noel submitted that an appellate court can make its own finding of fact and draw its own inferences from the evidence, and that this court is at liberty and is as good as a trial court, to come to its own conclusion from the evidence. He cited the case of *S.T.A.R.M. Ramanathan Chetty v. Wong Ah Sam* [1924] 4 FMSLR 229 Court of Appeal case as an authority on this point.

With respect, this proposition of law is against the weight of authorities. The Federal Court in the case of *China Airlines Ltd v. Maltran Air Corp Sdn Bhd* [1996] 3 CLJ 163, held that:

> It is a settled principle of law that in an appeal where facts have to be reviewed, it is undesirable to do so where the conclusions reached must to a large extent depend on the credibility of the witnesses and the impression formed by a court which has seen them and can judge their honesty and accuracy. *Crofter Hand Woven Harris Tweed Company Ltd & Ors. v. Veitch & Anor.* [1942] 1 All ER 142 and *Watt (Or Thomas) v. Thomas* [1947] 1 All ER 852 followed.
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> However, a distinction can be drawn between a finding of a specific fact which depends upon the credibility of witnesses and a finding of fact which depends upon inferences drawn from other facts. In the latter case, an appellate court will more readily interfere with the trial judge's findings of fact and form an independent opinion than in the case of the former. *Benmax v. Austin Motor Company Ltd.* [1955] 1 All ER 326 and *Tay Kheng Hong v. Heap Moh Steamship Co Ltd.* [1964] MLJ 87 followed.

In the circumstances, I find the appeal has no merit and I would dismiss the appeal with costs.